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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

MARCIANO PLATA, et al.,

Plaintiffs,

v.

ARNOLD SCHWARZENEGGER, et al.,

Defendants.

Case No. C01-1351 TEH

RECEIVER'S REPLY MEMORANDUM IN SUPPORT OF MOTION FOR ORDER MODIFYING STIPULATED INJUNCTION AND OTHER ORDERS ENTERED HEREIN

Date: August 27, 2007
Time: 10:00 a.m.
Dept: Courtroom 12, 19th Floor
Judge: Hon. Thelton E. Henderson

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I. INTRODUCTION AND FACTUAL BACKGROUND

The Court's February 14, 2006 Order appointing the Receiver ("Receivership Order"), directed the Receiver to file a Plan of Action "designed to effectuate the restructuring and development of a constitutionally adequate medical health care delivery system" in the State prisons. Receivership Order, p. 2:21-22. It also directed the Receiver to make "recommendations to the Court of which provisions of the (1) June 13, 2002 Stipulation for Injunctive Relief, and (2) September 17, 2004 Stipulated Order re Quality of Patient Care and Staffing Order (and/or policies or procedures required thereby), should be carried forward and which, if any, should be modified or discontinued due to changed circumstances." *Id.*, p. 2:22-27.

In compliance with the Receivership Order, the Receiver filed his Plan of Action ("POA") and this motion to modify the Stipulated Injunction and related orders "due to changed circumstances." In this motion, the Receiver agrees that the vast majority of the provisions of the Stipulated Injunction and other related orders should remain in place, but identifies a handful of provisions that should be eliminated or modified. The provisions identified should be eliminated because they are inconsistent with his POA, reflect *Plata* roll outs which are no longer applicable, or both.

Defendants have no objection to the Receiver's motion. Plaintiffs' counsel concede that many of the provisions identified by the Receiver should be removed from the Patient Care Order and the Staffing Order as proposed by the Receiver, but otherwise object to the Receiver's proposed modifications.

Plaintiffs' counsel's primary objection appears to be about modifying the Stipulated Injunction itself. Plaintiffs claim the Receiver's motion "betray[s] their interests" (Pl. Opp. 2:5)[1] by "eviscerat[ing] the injunctive relief obtained by the plaintiff class." *Id.* 1:27. Plaintiffs' counsel assert that "[t]hrough the Stipulated Injunction, Plaintiffs obtained from the state, *inter alia*, an enforceable obligation to provide them and the class they represent with medical care

[1] "Pl. Opp." refers to Plaintiffs' Opposition to Motion for Order Modifying Stipulated Injunction and Other Orders Entered Herein, filed June 29, 2007.

pursuant to a set of carefully tailored policies and procedures" which the parties agreed would provide constitutionally adequate care. *Id.*. 2:6-9. Plaintiffs also contend that they also "obtained something else that is very important – a codification of the responsibilities of their counsel to monitor the progress of compliance and to advocate on behalf of the individuals who are not receiving appropriate treatment." *Id.* 2:16-19. What plaintiffs' counsel's opposition refuses to acknowledge in any meaningful way, however, is that the Stipulated Injunction and related orders negotiated with and agreed to by defendants *did not work.* In other words, despite plaintiffs' counsel's efforts – including their monitoring efforts – the injunctive relief "won" by stipulation with defendants did nothing to remedy the abysmal medical care provided by the State to its prisoners. It was the Stipulated Injunction's utter failure that culminated in the appointment of the Receiver.

Hyperbole aside, plaintiffs' counsel's quarrel with the Receiver appears mainly to rest upon counsel's frustration about what they perceive to be improper generalities in the POA[2] and their desire to continue monitoring in a manner that is irrelevant in light of the POA.[3]

As set forth in the accompanying declaration of Terry Hill, the Chief Medical Officer for the Receiver, Plaintiffs' counsel's critique of the POA reflects a profound misunderstanding of the POA itself. It was developed in conformity with the widely-accepted conceptual framework for health care improvement articulated by the Institute of Medicine and the categories for organizational efficiency, productivity and service articulated by the Malcolm Baldrige National Quality Program. Declaration of Terry Hill filed herewith ("Hill Decl.") ¶¶ 9, 11. Sorely lacking from the CDRC is the infrastructure to deliver adequate services let alone to measure the

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[2] Plaintiffs' counsel have filed a separate opposition to the Receiver's POA, which does not challenge the conceptual underpinnings of the POA and reflects a general lack of understanding concerning the development of complex and inter-related systems to support medical care in the state's prisons. The Receiver has responded in detail to Plaintiffs' counsel's displeasure with his initial version of the POA in his reply to their opposition. For the Court's convenience, the Receiver will not repeat his reply here, but hereby incorporates it herein by reference.

[3] In an effort to continue their time-consuming, expensive, and no longer necessary monitoring role, Plaintiffs' counsel have also filed a motion for an order directing Receiver to comply with the April 4, 2003 Order re production and access to documents and/or modifying the order appointing the Receiver. The Receiver has also filed an opposition to that motion ("Access Opposition") filed on July 23, 2007. While he will address a few of the points raised in that motion here, for the Court's convenience, he will not repeat his opposition in full here, but hereby incorporates it herein by reference.

performance of the organization. *Id.* ¶ 12. Since the CDCR lacks the most basic organizational foundation necessary to perform at an even minimally competent level, developing and presenting timelines, metrics and details in the POA would have been premature when it was filed in May 2007. *Id.* ¶¶ 15-17. That said, the Receiver and his staff are working round the clock to transform the medical care system at CDRC. *See id.* ¶¶ 23, 29, 32-33. The Receiver intends to have the first elements of the quality measurement system in place by the November update of the POA. *Id.* ¶ 33; *see* Receiver's Access Opposition, filed July 23, 2007. Other than their objections to the POA, plaintiffs' counsel's substantive objections to the Receiver's proposed modifications are few.

With respect to the monitoring role played by plaintiffs' counsel, they fail to acknowledge that they obtained the right to monitor only *defendants'* implementation of agreed-upon plans to reform medical care at the State's prisons. Despite good intentions, those plans failed abysmally, necessitating the appointment of the Receiver. It serves little purpose for plaintiffs' counsel to continue to monitor defendants' compliance with plans that failed and which are being replaced by the Receiver's totally different approach to reforming the system. Further, plaintiffs' counsel's desire for continued monitoring fails to acknowledge that the appointment of the Receiver changed the process of reform from one driven by an adversarial, compromise process to one driven by the medical decisions of the Court-appointed and Court-supervised Receiver.

What the Receiver proposes instead of plaintiffs' counsel's monitoring is to create a new monitoring program run by the Office of the Inspector General ("OIG"). Reply Declaration of John Hagar filed herewith ("Reply Hagar Decl.") ¶ 25. The Receiver has developed a pilot monitoring program, which he anticipates implementing shortly. In the Receiver's view, this program is preferable to continued monitoring of the *Plata* standards by plaintiffs' counsel because it will be objective, it will facilitate the implementation of standardized quality measure grounded in medical science, it will focus on *Plata* remedial standards (including a clinical review of quality) rather than the impression of counsel, and it will be the first step in developing a model to evaluate medical care delivery in the State prisons that can be turned over to the State when the Receiver's work is complete. *Id.* ¶ 27. Moreover, plaintiffs' counsel's monitoring is

extremely burdensome and of limited utility to the Receiver. *Id.* ¶¶ 11-22, Exh. 7. *Responding to the monitoring activity consumes over 11 person years annually, that is, it takes more than 11 staff persons working 40 hours a week, 52 hours a year to respond. Id. ¶ 22,* Exh. 7.

The primary remaining objection made by Plaintiffs' counsel is the repeated claim that the Receiver has failed to meet his burden for modification because there has not been a change in circumstance since the Stipulated Injunction and related orders were entered. Saying so repeatedly does not make it so. The appointment of the Receiver, the factual bases for that appointment, and the Receiver's different approach have profoundly changed the landscape from that which existed when the Stipulated Injunction and related orders were entered. Through the Stipulated Injunction, the parties tried to create a top down, centralized planning model for reform. It did not work. By appointing a receiver, the Court changed the approach and gave the Receiver broad powers to do whatever is necessary to render medical care in the prisons constitutional. And the Receiver is actively doing just that by engaging qualified medical personnel to create a POA that is medically supportable. *See* Hill Decl. ¶¶ 13, 27, 32. Moreover, the Court already directly or indirectly found that the appointment of the Receiver and his different approach would be "changed circumstances" justifying appropriate modifications in its Order Appointing Receiver when it directed him to bring a motion to modify the Stipulated Injunction and the Patient Care and Staffing Order.

The Receiver understands and appreciates Plaintiffs' counsel's frustration that the California prison medical system is not yet fixed. The failure of the Stipulated Injunction and other related negotiated orders is a reflection of the depth and complexity of the problem the Receiver has now been charged to remedy. The solution will take time, flexibility, and a workable plan for systemic change, however, not rigid procedures with unworkable time frames. The Receiver urges plaintiffs' counsel to remember that he shares their primary goal – getting constitutional health care in place. He is committed to achieving that goal, and has set in motion the necessary first steps to build a constitutional system as set forth in his POA.

Since the provisions of the Stipulated Injunction and related orders identified by the Receiver in his motion are inapplicable, contradictory, and/or unduly burdensome in light of the

POA, the Receiver submits that his proposed changes to the Stipulated Injunction and related orders should be adopted. He will address each of the disputed issues below.[4]

II. ARGUMENT

A. Changed Circumstances Warrant the Modification of the Stipulated Injunction and Related Orders.

The Court has the discretion to modify "the terms of an injunctive decree if the circumstances, whether of law or fact, obtaining at the time of its issuance have changed, or new ones have since arisen." *System Federation No. 91, Railway Employees Dep't, AFL-CIO v. Wright*, 364 U.S. 642, 647 (1961). That showing is made where "changed factual conditions make compliance with the decree substantially more onerous," the decree has proven "to be unworkable because of unforeseen obstacles," or "enforcement of the decree without modification would be detrimental to the public interest." *Rufo v. Inmates of the Suffolk County Jail*, 502 U.S. 367, 384 (1992). The new circumstances must have been unanticipated at the time of the original decree. *Id.* at 385.

Plaintiffs' counsel do not dispute that this Court has the equitable discretion and authority to modify the Stipulated Injunction and related orders, or that a "significant change in circumstances" warrants revision of a decree. Pl. Opp. 7:12 *quoting Rufo,* 502 U.S. at 383. The disagreement here is quite narrow: namely, has the Receiver established that a change in circumstances warrants modification of the Stipulated Injunction and related orders? Under the facts here, the Receiver submits that the answer is yes.

When plaintiffs' counsel and defendants entered into the Stipulated Injunction and the related orders it is fair to conclude that they believed that the Stipulation Injunction and those orders would be successful in ensuring that the State provided constitutional medical care to its prisoners. The goal was to reform the woefully inadequate system.

[4] Plaintiffs' counsel have literally filled their brief with an all out assault on the Receiver's commitment, competence and ethics, which the Receiver and each member of his staff find deeply offensive. Despite the temptation to respond in kind or spend this brief refuting each unwarranted accusation, the Receiver instead will attempt to bring the discussion back to the legal and factual issues raised by the motion. That said, to the extent that the Receiver does not directly address any of plaintiffs' counsel's comments, he does not mean to suggest that they have any merit.

It is unquestionable, however, that there was an abject failure by the State to achieve constitutional standards despite the Stipulated Injunction and related orders. The State either could not or would not make the changes necessary resulting in this Court issuing its October 3, 2005 Findings of Fact and Conclusions of Law Re the Appointment of a Receiver ("FFCL"). In the 53-page FFCL, the Court detailed the State's failures in providing constitutional medical care to its prisoners, finding that there was "no realistic alternative" to an appointment of a receiver. FFCL 49:23. The Court indicated that its goal was to appoint "a full Receiver with the leadership, commitment, experience, and vision to take on the monumental and critical task of bringing the level of medical care provided to California's 165,000 inmates up to constitutional standards." FFCL 52:3-6.

On February 14, 2006, this Court appointed the Receiver and gave him a mandate to move forward expeditiously to remedy the deficiencies in the system. The Court vested in the Receiver the duty to control, oversee, supervise and direct all administrative, personnel, financial, accounting, contractual, legal and other operational functions of the medical delivery component of the California Department of Corrections and Rehabilitation ("CDCR"). As described more fully in the Receiver's opening brief, the appointment of the Receiver itself, therefore, reflects one of the most profound changes since the Stipulated Injunction and related orders were entered. Receiver's Opening Br. at p. 8.

Not only is the appointment of the Receiver alone a profound change in circumstance, the Receiver's remedial approach is dramatically different from the prior model. Unlike the prior model, which did not, and could not, produce a constitutionally-adequate health care delivery system, the Receiver has concluded that "the CDCR requires an entirely new infrastructure of medical delivery *before* necessary programs of clinical remediation can be effectively implemented in a sustainable manner." Receiver's Report re Overcrowding, filed herein on May 15, 2007, p. 7:17-18 (emphasis added); Hill Decl. ¶¶ 15, 17, 21-23, 29. The system is so utterly broken that the Receiver must rebuild it from the ground up. *Id.* ¶ 29; *see also* Receiver's Reply in Support of POA, filed July 30, 2007.

The Receiver has been engaged in the investigative process for just over a year, although

numerous changes in the system have already been made or are in process. See POA, Section G, "Organizational Transformation Strategies." The POA represents the Receiver's comprehensive approach to building a constitutionally adequate health care system. Hill Decl. ¶¶ 6-17; 21-23; 29-33.

The Receiver's more global perspective and his charge to remedy the entire system, rather than merely discrete problems within the system, have important implications for the continued vitality and utility of the Stipulated Injunction and related orders. As set forth in his opening brief, the Receiver has stated in the POA:

> [T]he care standards set forth in the June 2002 Stipulated Injunction and the September 2004 Patient Care Order . . . cannot be met and sustained without the appropriate and necessary support provided by a well-functioning, administratively-sound health care organization. Attempts to implement these standards in isolation have proven to be ineffective—indeed prior remedial efforts have wasted time and resources—because nearly every area within the CDCR, *e.g.*, procurement, custody support, population, and personnel, affects and potentially hinders each process of health care delivery. Each function of the organization as a whole, as well as pertinent functions of other State agencies, must be analyzed and modified appropriately to support a redesigned, effective, constitutionally-adequate health care operation. As the Office of the Receiver learned at San Quentin, the inter-relatedness of the problems and processes within the institution, as well as between the institution, CDCR, State overhead and control agencies, the Legislature, and the Governor is an immense barrier. The Receiver's Plan of Action addresses the impact and inter-relatedness of all the pertinent processes within the CDCR and the State.

POA, p. 10. The Receiver has found that the "original remedial processes . . . worked to establish 'silos' of health [care] delivery in California's prisons, driving up the overall cost of care and creating unnecessary tensions between the medical, mental health, and dental disciplines." Report Re POA, p. 5:11-13. In the Receiver's view, the Stipulated Injunction and related orders did not work, and he intends to take a different tact:

> The June 2002 Stipulated Injunction and the September 2004 Patient Care Order specified a number of worthy patient care standards, but for multiple reasons the defendants had little chance of achieving them. For example, the stipulations stopped short of addressing the requisite custody and support staff, technology, space, and personnel processes. Furthermore, the State attempted to apply innovations in a pre-determined, *en bloc* fashion rather than on a pilot basis, and the delivery system remained dominated by the solo physician model rather than team-based care. These errors will not be repeated. Instead, the Receiver will apply an entirely new method of transformation to the medical delivery system in California's prisons.

POA, p. 10.

"The Receiver is determined to avoid the pre-determined, entire-system 'roll-out' projects that were characteristic of prior State efforts, most of which were clumsy affairs that fell short of full implementation." POA, p. 40; *see also* Report Re POA, p. 4. This "roll out" methodology is at the heart of the Stipulated Injunction that the Receiver seeks to modify. Instead, the Receiver has determined that the most effective methodology is "to pilot changes before attempting system-wide implementation. The San Quentin project and the Receiver's takeovers of contracting and pharmacy management have piloted new programs, processes, positions, and software prior to full-scale implementation." POA, p. 40. Still other pilot projects are underway. *See* Hill Decl. ¶¶ 20, 24-27, 29; Reply Hagar Decl. ¶¶ 10c, 10b, 26.

The Receiver has summarized the other fundamental differences between his Plan and the approach reflected in the Stipulated Injunction and related orders. Report Re POA pp. 4-5; Receiver's Opening Br. at p. 10. Plaintiffs' counsel's contention that there is no "nexus" linking the appointment of the Receiver to a change in circumstances warranting modification of the Stipulated Injunction and the related orders is simply unsupported and unsupportable. The Receiver needs the modifications to proceed unfettered with his POA.

All of the facts described above and in the Receiver's opening papers demonstrate the fundamental change in circumstances warranting change of the Stipulated Injunction and related orders here. The Receiver's motion should be granted.

B. The Proposed Modifications are Suitably Tailored to the Changed Circumstances.

Once the Receiver meets his burden, the Court must determine "whether the proposed modification is suitably tailored to the changed circumstances." *Rufo,* 502 U.S. at 383, 391. In making that determination, "the focus should be on whether the proposed modification is tailored to resolve the problems created by the change in circumstances." *Id.* Moreover, "the public interest and 'considerations based on the allocation of powers within our federal system'" (*id.* at 392), must be factored into the mix.

Here, the Receiver proposes to leave most of the provisions of Stipulated Injunction and related orders intact. As discussed below, most of the provisions identified by the Receiver for

modification go to various implementation aspects of the medical care system, e.g., establishing medical policies and procedures, RN coverage, and auditing of compliance. Since the Receiver has been charged with restructuring day-to-day operations and developing, implementing, and validating a new, sustainable prison medical health care delivery system that provides constitutionally adequate medical care (Order Appointing Receiver 2:11-14), he has been required to come up with his own plan to address these very same issues. The previously agreed-to items do not neatly fit within the Receiver's new vision, and in fact are inapplicable, contradictory, and/or unduly burdensome. It would divert the Receiver from his mission to require him to comply with provisions he no longer believes are relevant and which are addressed differently in his POA. In fact, so requiring the Receiver will result in a duplication of effort and unnecessary expense which will be borne by the taxpayers.

The provisions concerning plaintiffs' counsel's monitoring of the *Plata* roll outs, including the rights given to them to inspect prison facilities and demand documentation bears special mention. Now that the Receiver has been appointed and he has developed the POA, the *Plata* roll outs are no longer relevant. Moreover, as discussed more fully below, it has imposed a tremendous burden on the Receiver's staff to respond the plaintiffs' counsels' requests for information. Reply Hagar Decl. ¶¶ 11-22 and Exh. 7. The Receiver proposes to eliminate these provisions from the order. He also proposes to implement a new monitoring program through which the OIG will monitor the prison's medical care delivery. *Id.* ¶¶ 25-29 and Exh. 8. Removing these provisions is suitably tailored since the Receiver will continue to answer to the Court, which has imposed its own reporting requirements and deadlines upon him.

Plaintiffs' counsel assert that the Receiver has not shown that continued adherence to the Stipulated Injunction and related orders is more onerous, unworkable, or detrimental to the public interest. Pl. Opp. p. 39. Nonsense. The Receiver has explained *ad nauseum* that the *Plata* roll out standards are inconsistent with his POA. Compliance with those provisions while simultaneously working to develop his own system from the ground up necessarily make his task more onerous and unworkable. Moreover, continuing to abide by standards that are being replaced in the POA is detrimental to the public interest. Compliance with such standards diverts

the Receiver from more productive activities, confuses staff and complicates the Receiver's already complex and difficult work. Moreover, it creates overlapping inconsistencies. The time the Receiver and his staff must spend to keep the conflicting standards straight necessarily increases the expense of the Receivership estate. Reply Hagar Decl. ¶ 22. All of these are detrimental to the public interest, which is to get a constitutional system in place as soon as possible while minimizing expense.

C. The Receiver Does Not Stand in the Shoes as the State

Plaintiffs contend that upon his appointment, the Receiver "stepped into the shoes of the *Plata* defendants, and became bound by the orders existing at the time of his appointment." Pl. Opp. 22:22-24, citing 28 U.S.C. § 959(b); *Lank v. New York Stock Exchange*, 548 F.2d 61 (2d Cir. 1977); and *Ledo Financial Corp. v. Summers*, 122 F.3d 825 (9th Cir. 1977). It is not clear what Plaintiffs hope to gain by making this erroneous argument. Do they mean to contend that the Receiver cannot seek modification of the Stipulated Injunction and Related Orders? That would be an odd argument given the prevailing legal standards which they cited in their brief and this Court's Order, which specifically directs the Receiver to bring this motion.

Plaintiffs are wrong on the law in any event. The principle that a receiver "stands in the shoes" of the entity for which he has been appointed is inapplicable in cases, such as this, in which the receiver has been appointed pursuant to a federal court's remedial and equitable powers.

To remedy federal constitutional violations and to effect sweeping changing in the California prisons, this Court appointed the Receiver pursuant to the Court's powers in equity. *See* FFCL pp. 34, 42 (and cases cited therein). The "district court has broad powers and wide discretion to determine the appropriate relief in an equity receivership." *SEC v. Lincoln Thrift Ass'n*, 577 F.2d 600, 606 (9th Cir. 1978). *See also SEC v. Wencke*, 622 F.2d 1363, 1369 (9th Cir. 1980) (power of federal court to appoint receiver "derives from the inherent power of a court of equity to fashion effective relief."). The receiver is an agent of the Court, and *not* of any of the parties. *SEC v. American Capital Investments*, 98 F.3d 1133, 1143 (9th Cir. 1996); *SEC v. American Principal Holding, Inc. (In re San Vicente Medical Partners Ltd.)*, 962 F.2d 1402,

1409 (9th Cir.), *cert. denied*, 506 U.S. 873 (1992); FFCL, p. 32. The scope of the receiver's authority is governed by the court's order appointing him. *RTC v. Bayside Developers*, 43 F.3d 1230, 1241 n.8 (9th Cir. 1994). It follows, therefore, that "an equity receiver *does not merely inherit an owner's rights*; the receiver is an officer of the court entrusted with administration of the property." *Gaskill v. Gordon*, 27 F.3d 248, 251 (7th Cir. 1994) (emphasis added).[5] The Receiver, therefore, is not bound to the stipulations executed by the defendants. The Court should not hold otherwise.

D. The Receiver Welcomes Scrutiny As He Accomplishes His Mandate

One of the fundamental underpinnings of Plaintiffs' counsel's opposition is their claim that the Receiver is secretive and unaccountable. To the contrary, the Receiver is committed to transparency and has gone to great lengths to communicate about the actions of the Receivership to this Court and to the public at large. Reply Hagar Decl. ¶¶ 31-33. The Receiver has filed five Bi-Monthly and Quarterly Reports thus far, each of which describes in considerable detail the Receivership's activities during the reporting period. *Id.* ¶ 31. He will continue to prepare and file those reports as directed by the Court. He also regularly communicates with the CDCR staff, CDCR prisoners as well as engaging in public interviews and appearances. *Id.* ¶ 32-33. All of the Receiver's reports to the Court, other Court filings and other Receivership documents are available to members of the public 24 hours a day, 7 days a week, through the Receiver's website, www.cprinc.org. *Id.* ¶ 31.

This record demonstrates that the Receiver not only espouses transparency, he acts upon it by sharing of information with the public at large in multiple manners. It seems that plaintiffs' counsel's real issue is that the Receiver does not ask plaintiffs' counsel before he does things. Of course, the whole point of appointing a receiver is to put an independent actor in charge who can get things done and who is not mired in the adversarial process. It is perhaps a backhanded complement to the Receiver that Plaintiffs' counsel is so frustrated by his independence.

[5] The Receiver has briefed this issue in more detail in his Access Opposition.

E. Provisions of the Stipulated Injunction that should be modified.[6]

Below, the Receiver will address each contested proposed modification.

1. Implement Inmate Medical Services Program (IMSP) Policies and Procedures in accordance with multi-year roll out schedule (Stipulated Injunction, ¶¶ 4-5).

Plaintiffs object to modifying the Stipulated Injunction to remove the requirement that defendants implement a set of medical care Policies and Procedures on a roll out basis from 2003-2008. While the Receiver appreciates that Plaintiffs' counsel negotiated the Policies and Procedures to be rolled out at the State's prisons over a number of years, it did not work.

This provision of the Stipulation Injunction has two components: one, a roll out schedule for implementation of the Policies and Procedures; and two, the Policies and Procedures themselves.

With respect to the roll out schedule, it unquestionably failed. It makes no sense to require the Receiver to comply with a roll out schedule that has already failed and which is inconsistent with the POA.

With respect to the Policies and Procedures, everyone agrees that they must be a part of the POA, and they are. They remain in place today. What the Receiver seeks here is an order eliminating the requirement of compliance with the specific Policies and Procedures so that any of them may be adapted, modified or jettisoned as appropriate as the POA is developed. The success of the POA depends on flexibility. Simply adopting the negotiated Policies and Procedures does not give the Receiver the flexibility to come up with policies and procedures that work to achieve his mandate. Reply Hagar Decl. ¶¶ 7-8, 10a.

Plaintiffs' objection seems to be focused on the lack of time frames in the Receiver's initial POA. (Pl. Opp. 10:3-18). As the Receiver has set forth in his reply concerning the POA, it is a living, *flexible* document, and will contain timeframes as the Receiver initiates his pilots,

[6] In his opening papers, the Receiver cited to his POA and the Declaration of John Hagar ("Hagar Decl.") in support of the factual basis for his requested modifications. In his declaration, Mr. Hagar, the Receiver's Chief of Staff, explains in detail the proposed modifications and the problems the Receiver faces with the Stipulated Injunction and related orders. Although Plaintiffs' counsel take potshots at that declaration in their brief, they filed no objections to it. The Receiver is also filing a Reply Declaration of John Hagar and the Declaration of Terry Hill, the Receiver's Chief Medical Officer, to address certain factual issues raised by the Plaintiffs' counsel.

tests them and adjusts them to ensure they work, and then implements the programs system wide. The Receiver could write down schedules and deadlines now, but they would be meaningless until more work is done. Hill Decl. ¶ 16.

Plaintiffs' counsel mention the Chronic Care program specifically in their opposition. Pl. Opp. 10:19-11:7. They do not understand why the Receiver simply does not adopt the protocols concerning Chronic Care set forth in the Policies and Procedures they negotiated with defendants. The protocols, however, may not address all of the issues necessary to create a flexible, workable plan to deliver appropriate medical care, particularly in "a system with chaotic medical records, pharmacies and laboratories, in which nurses and physicians have rarely worked together in teams, and in which custody and healthcare staff have often worked at cross purposes." Hill Decl. ¶ 26. The Receiver must be able to develop protocols he believes are appropriate under prevailing community medical standards, not try to fit in the protocols plaintiffs' counsel developed into his Plan. *See id.* ¶¶ 26-27. The requested modification should be granted.

2. Implement the following requirements regardless of roll out status: 24 hour coverage by RNs in emergency clinics; intrasystem transfers per policy; treatment protocols implemented as resources allow; priority ducat system implemented; outpatient special diets available for patients with liver and kidney end-stage failure (Stip. Inj, ¶¶ 6a-6e).

The Receiver requests that these provisions of the Stipulated Injunction be eliminated because they are not easily integrated into the POA, they are operationally too vague, and they address specific problems as if they were isolated and independent of the system as a whole, which they are not. Based on their monitoring tours, Plaintiffs' counsel believe that these requirements have been implemented completely, or almost completely. Pl. Opp. 12:1-6. Unfortunately, plaintiffs' counsel are mistaken. The requirements have not been implemented at the prisons. Reply Hagar Decl. ¶ 10b. Moreover, the POA will change these standards as each area is redesigned based on the best available medical evidence and professional judgment. Hill Decl. ¶ 31. From a medical perspective, many of these orders do not adequately address the complex issues involved. *Id.* As they are inconsistent with and prioritized differently than in the POA, the Receiver requests that they be removed from the Stipulated Injunction.

3. Institute Director's level review for inmate appeals (Stip. Inj., ¶ 7).

The Receiver requests that Institute Director top level review of inmate appeals be eliminated so that the Receiver may develop an entirely new medical complaint and appeal process, coordinating with the needs of the *Coleman*, *Perez*, and *Armstrong* remedial plans and building on the information learned from the San Quentin patient advocacy model. Receiver's Opening Br. 13:13:26-14:7. Although Plaintiffs state that they "support this request," (Pl. Opp. 15:20), they either deliberately or inadvertently misapprehend the Receiver's proposed modification. Plaintiffs suggest that the new process would involve plaintiffs' counsel advocating for individual prisoners immediately after the inmate exhausted the 602/inmate-grievance procedure. The Receiver, however, proposes to replace the procedure with a new medical complaint and appeal process that is clinically-focused.[7] The Receiver's new plan will focus on inmate appeal advocates who are nurses and who can perform appropriate clinical screening. A pilot of this program has been implemented at San Quentin. Reply Hagar Decl. ¶ 10c.

4. Audit each prison's compliance with IMSP Policies and Procedures consistent with roll out schedule; develop audit instrument and file it with the court; achieve 85% overall compliance with IMSP Policies and Procedures and conduct minimally adequate death reviews and quality management proceedings to reach substantial compliance (Stipulated Injunction, ¶¶ 19-23).

The Receiver requests that these compliance standards be eliminated since they are based on the roll out model that is the heart of the failed Stipulated Injunction. It bears repeating that the Receiver has developed a detailed remedial program in his POA that is inconsistent with the stipulated approach negotiated by plaintiffs' counsel and the State. When implemented, the Receiver's POA is intended to bring the entire system into compliance with constitutional standards. The POA also includes its own metrics for determining when compliance has been achieved and for maintaining quality of performance within the system. POA, pp. 43-50; *see,*

[7] The Receiver also maintains the confidentiality of his communications with inmate patients. *See* Declaration of John Hagar in support of Receiver's Opposition to Plaintiffs' Motion for an Order Directing Receiver to Comply with April 4, 2003 Order and Access to Documents and/or Modifying the Order Appointing Receiver, filed on July 23, 2007 ("Hagar Access Declaration").

e.g., Goal A, Objective A.8; Goal B, Objective B.10.1; Goal C, Objectives C.1.1, C.2, C.6; Goal D, Objective D.2; *see also* Report Re POA, pp. 6-9; Hill Decl. ¶¶ 21-23, 33. In addition, the POA sets forth specific programs to develop, review and implement policies and procedures on an ongoing basis, including policies and procedures for death reviews and quality management programs. *See* POA, p. 48; Goal C and Objectives C.4 – C.8; Goal D, Objective D.3.1; Report Re POA, pp. 6-9; Hill Decl. ¶¶ 21-23, 33; Hagar Access Declaration, filed July 23, 2007, ¶¶ 15-19.

Continuing to audit each prisons' compliance with metrics that do not apply is a waste of resources and the public fisc, and impacts the ability to provide medical care to prisoners.

5. Institution and patient monitoring by plaintiffs' counsel and institutional information access and reporting to plaintiffs' counsel (Stipulated Injunction, ¶¶ 7, 9-15).

No issue has inflamed plaintiffs' counsel as much as the Receiver's proposal to eliminate that portion of the Stipulated Injunction permitting them to monitor institutions and requiring institutional information access and reporting to them. The Receiver appreciates the role that plaintiffs' counsel played in getting attention focused on the crisis in medical care at the California prisons. With the appointment of the Receiver, however, the role that plaintiffs' counsel has played in monitoring the *Plata* roll outs is no longer necessary, and, in fact, has become counter productive given the sheer amount of resources required to respond to plaintiffs' counsel's demands for information.[8]

a. Plaintiffs' counsel's monitoring is unduly burdensome on the Receiver, his staff, and his prison medical staff

Plaintiffs' counsel state that the Receiver's assertion that their monitoring is extremely burdensome is "specious." Pl. Opp. p. 31. They snipe at the Receiver claiming that his "handsomely staffed office" should have no trouble responding to plaintiffs' information demands. *See id.* 3:4-13, 32:1-10. They appear to have a fundamental lack of comprehension of the burdensome nature of their monitoring.

[8] Notably, at the outset of the Receivership, plaintiffs' counsel informed the Receiver that he worked for them. The Receiver most assuredly informed them that he did not. He works for Judge Henderson. Reply Hagar Decl. ¶ 6.

Plaintiffs' counsel's monitoring takes both a human and a budgetary toll. Contrary to their suggestion, it is not the Receiver's office staff that bears the bulk of the burden in responding to their constant requests for information. Instead, it is the CDCR staff in the prisons – including medical staff – that must reallocate resources from the performance of regular CDCR duties to respond to plaintiffs' counsel's monitoring demands. Annually, it takes over *11 person years* (11 people working 40 hours a week, 52 weeks a year) to respond to plaintiffs' counsel's monitoring demands. Reply Hagar Decl. ¶ 22, Exh. 7. Many of the staff involved are those most critical for medical delivery in the prisons. *Id.* ¶ 22. Since the monitoring is of useless, inapplicable *Plata* standards, does not assist the Receiver to accomplish his goals and charged task of providing constitutional medical care, and it diverts significant manpower resources that he believes could be better spent elsewhere, the Receiver believes it should be stopped.

Plaintiffs' counsel take issue with Mr. Hagar, the Receiver's Chief of Staff, describing the burden their monitoring has on the Receiver's staff, prison staff, including medical care staff. (Pl. Opp. 31:23-25). While the Hagar Declaration more than competently describes the problems caused and the burdens imposed by plaintiffs' counsel's monitoring (Hagar Decl. ¶¶ 9-11), the Receiver thought it would be helpful to the Court to see plaintiffs' counsel's demands in their own words to understand the burden they impose on CDCR's already overtaxed resources.

Accordingly, attached as Exhibit 1 to the Reply Hagar Declaration is a copy of documents generated by plaintiffs' counsel in connection with the *Plata* monitoring set forth in the Stipulated Injunction just for the time period of January 1, 2007 through April 30, 2007. Exhibit 1 is voluminous, consisting of (1) of pre-prison visit letters detailing information to be supplied at each of plaintiffs' counsel's prison visits, (2) post-prison inspection letters about plaintiffs' counsel's "findings" and observations during specific prison inspections, (3) lists of questions for Friday conference calls at which plaintiffs' counsel ask questions, (4) correspondence and agendas for monthly meetings with plaintiffs' counsel, and (5) document requests concerning particular prisoners.[9] (Omitted from the exhibit are the responsive documents). A cursory

[9] An index to the material is contained at Exhibit 2 to the Reply Hagar Declaration.

review of the correspondence and questions from plaintiffs' counsel shows the dramatic breadth of information demanded by them.

For example, from just January – April 2007, Plaintiffs' counsel visited 18 prisons, 16 for two days, and two for a single day, for a total 34 days of prison visits. Needless to say, it requires substantial time for prison and medical professionals at the prison to prepare for each such prison visit and requires significant staff time (including medical providers) to respond to plaintiffs' counsel's inquiries during the visit. Reply Hagar Decl. ¶¶ 14, 22, Exh. 7. Over 6 person years a year (40 hours a week, 52 weeks a year) are consumed responding to plaintiffs' counsel's monitoring prison tours. *Id.* ¶ 22, Exh. 7.

Plaintiffs' counsel wrote to a deputy attorney general on July 10, 2007 concerning a July 18-19 monitoring visit at Kern Valley State Prison. Reply Hagar Decl. ¶ 16, Exh. 3. This letter is typical of the pre-visit letters sent by plaintiffs' counsel and shows impact the monitoring has on the Receiver and his staff. *See id.* Exh. 3. Notwithstanding the failure of the "roll out" remedial model, Plaintiffs' counsel indicated that she hoped to learn about any implementation efforts and plans given that the prison was now a "roll out" prison. Plaintiffs' counsel goes on to state that she intended "to visit medical care facilities and talk with inmates and staff regarding how the medical care delivery system currently works." She indicated that she planned to speak with the Health Care Manager, the Warden, and other managers, supervisors and staff, including the health records and nursing supervisors and medical appears analyst, concerning *Plata* implementation and medical care issues. Her letter continues:

> I would like to discuss the current status of medical clinic and ancillary staffing (established positions and vacancies), and the matters that the prison is supposed to have already addressed: preventive services, notification to patients of diagnostic test results, physical therapy, emergency response review and documentation thereof, priority ducats for medical appointments, health care transfer process, "24/7" RN coverage, availability of translators for non-English speaking patients, and implementation of a hunger strike protocol.
>
> In addition, I would also like to discuss the current process for, and status of specialty services scheduling (including any problem areas), and the current status of medical records, physician lines (including approximate time-frames for routine appointments in each clinic) registered nurse responsibilities, and medical appeals....
>
> I will then tour some of the medical clinics and related areas....

> At some point, I would like to talk with the medical appeals analyst and review the requested medical appeals (a list of those has been emailed to… CDCR-Legal). I would also like to talk with those who actually review, process, track and schedule specialty service requests, and visit their work areas. I will also, throughout the tour, be looking in unit health records (UHR), and specifically intend to review the UHRs listed at the end of this letter. I also intend to review any emergency response review committee (ERRC) minutes from this year and last, and any Quality Management Committee minutes form the current calendar year.
>
> …I would like to end the visit with an "exit interview" with at least the health care manager and key medical supervisors, but including the warden and others if they are interested….

Id. Exh. 3. The letter attached a list of 18 inmates whose unit health records counsel intended to review at the prison inspection. *Id.* (prisoner identities redacted). This same process and the same type of requests are duplicated over and over for each prison visit, 18 prison visits in total over the first four months of 2007.

Then, following each prison inspection, plaintiffs' counsel writes a lengthy letter detailing their observations during the prison visit, including what *they believe to be Plata* compliance issues. *See e.g.,* Reply Hagar Decl. Exh. 4 (July 10, 2007 18-page letter re tour of CSP-Solano).[10] Plaintiffs' counsel prepare these letters without the benefit of any physician medical review of the information they have gathered. *Id.* ¶ 18.

Three times each month, plaintiffs' counsel conducts a Friday telephone call with health care managers at the prisons. In advance, counsel submit detailed questions and expect answers during the calls. *See, e.g.,* Reply Hagar Decl. Exh. 1 pp. PLO 265-268 (4-page List of PLO Questions for January 12, 2007 Health Care Manager Call for Region 1). Not surprisingly, it also takes a great deal of medical staff time to prepare for these calls. But counsel are still not finished. The Chief Medical Officer also meets with plaintiffs' counsel on a monthly basis, which also requires significant preparation time. *Id.* ¶ 19.

On its face, this monitoring process is unduly burdensome on the Receiver and his medical staff. Reply Hagar Decl. ¶ 22, Exh. 7. Plaintiffs' counsel suggest that the Receivers' resources are unlimited and that it should not impose any undue burden on him and his staff to

[10] The Receiver does not find these letters of assistance as they identify problems in isolation, most of which the Receiver is already aware. They also attempt to focus the Receiver's priorities on individual prisons when he already has a plan to address the issues in a systemic way. Reply Hagar Decl. ¶ 21.

comply with the monitoring portion of the Stipulated Injunction. Plaintiffs' counsel's position, however, fails to recognize three realities. One, the primary impact is on CDRC staff – including medical staff – not the staff in the Receiver's office. *Id.* ¶ 22, Exh. 7. Two, every moment any CDRC employee or member of the Receiver's staff is providing information to plaintiffs' counsel is a moment that person is not reforming the current deficient medical care system and/or providing medical care to the State's inmates. Three, there is limited relevance (if any relevance at all) to the Receiver and his mission for plaintiffs' counsel to continue to monitor *Plata* roll out standards that have failed and are no longer applicable. *Id.* ¶¶ 20-21. Frankly, it approaches the level of busy-work for plaintiffs' counsel to continue to monitor *Plata* roll outs which have not worked and which the Receiver has rejected in creating the POA. Both the Receiver's resources and plaintiffs' counsel's resources should be better spent on more productive activities.

b. Plaintiffs' counsels misapprehend the value of their monitoring efforts; the Receiver does not find their reports to be very helpful

Plaintiffs' counsel posit that they and they alone have uncovered significant problems at the prisons which they have reported to the State in their post-prison visit letters. In Receiver's view, however, Plaintiffs' counsel's letters are of limited utility at best. Reply Hagar Decl. ¶¶ 20-21. They focus on issues identified primarily through discussions with prison staff, who are not always accurate, and fail to take cognizance of the systemic issues that Receiver must address to build a competent health care system while a grossly deficient one operates around it. *Id.* ¶ 21. Sometimes their post-prison visit letters are simply inaccurate. For example, plaintiffs' counsel conducted a monitoring visit of San Quentin on February 20-21, 2007, and submitted a nine-page post-prison visit letter on March 7, 2007. That letter was replete with inaccuracies, as addressed in detail in the Receiver's Chief of Staff's responsive letter dated May 8, 2007. *Id.* ¶ 20e, Exh. 6. Other times, plaintiffs' counsel simply miss large issues with great impact on prisoner inmates while focusing on well-known issues. *Id.* For example, in one 11-page post-prison visit letter, plaintiffs' counsel noted in passing that all women prisoners would be transferred from CRC. The letter did not otherwise comment on this issue which the Receiver found to be of great

concern given that the transfer of the women prisoners would have a very negative effect on the delivery of medical care to them. *Id.*, ¶ 20e, Exh. 6 at pp.3-4.

The Receiver does not intend to interfere with plaintiffs' counsel's role as class counsel. Counsel can and should continue to communicate with their clients and advocate on their behalf. They can continue to correspond with inmates and go to the prisons to meet with their clients. What the Receiver does not need, however, is interference with his medical staff. Nor does he need detailed reports of what plaintiffs' counsel believe to be the most pressing issues at any individual facility, which are accompanied by counsel's expectation that he will take action on those reports without regard to the POA and its priorities.

Plaintiffs' counsel claim that their oversight role is now more important than ever. The Receiver respectfully disagrees. Previously, plaintiffs' counsel negotiated with defendants to come up with a plan for reform, and included mechanisms to measure the plan's success. That plan failed. The Receiver is now in place, and must answer to the Court. The Court, not plaintiffs' counsel, will exercise the necessary oversight of the Receiver. And if issues arise the parties want addressed by the Receiver, they are always free to petition the Court to instruct the Receiver to do so.

c. The Receiver wishes to implement an external monitoring system run by OIG which will provide the necessary checks on quality performance

What the Receiver proposes instead of plaintiffs' counsel's monitoring is to create a new external monitoring program run by the OIG. This monitoring project will be designed with the existence of the Receivership and the Receiver's metrics in mind, not inapplicable *Plata* roll outs. The OIG is well-suited for this role given it has participated in the *Madrid* remedial process in an effective manner. The Receiver laid out the potential benefits of involving the OIG in his opening brief at pages 17-18. As promised in that opening brief, the Receiver has continued to work on the new monitoring pilot since he filed his motion papers. He has now developed its framework. Reply Hagar Decl. ¶¶ 25-27 and Exh. 8.

As set forth in detail in Exhibit 8 to the Reply Hagar Declaration, it is anticipated that the OIG program will be implemented in three distinct phases. During the Phase I, the OIG will

develop in conjunction with the Receiver the health care components selected for inspection, which include the *Plata* essential components. With the assistance of medical experts, the OIG will develop audit instruments for each of the areas components selected for inspection. The OIG will test and refine the audit instruments at five pilot institutions: Valley State Prison for Women, California State Prison – Corcoran, Mule Creek State Prison, California State prison – Los Angeles County and Calipatria State Prison. The OIG will prepare and issue a public report following each inspection. During Phase Two, the OIG will assume inspection and audit responsibilities at all State prisons affected by the *Plata* lawsuit. In Phase Three, the OIG will turn over its inspection and audit responsibilities to CDCR or the Receiver. At that point, the OIG will assume a monitoring role and will develop monitoring methodologies accordingly.

In the Receiver's view, this program is preferable to continued monitoring of the *Plata* standards by plaintiffs' counsel because it will be objective, will facilitate the implementation of standardized quality measures grounded in medical science, will include medical review, and will be the first step in developing a model to evaluate medical care delivery in the State prisons that can be turned over to the State when the Receiver's work is complete.

In support of their argument that continued monitoring by plaintiffs' counsel is necessary even if there is another monitor, plaintiffs' counsel cite *Duran v. Caruthers*, 885 F.2d 1492 (10th Cir. 1989) and *Jackson v. Los Lunas Center,* 2007 U.S. Dist. LEXIS 40210 (D.N.M. 2007). Neither case addresses a situation where a Receiver seeks to modify a consent decree to eliminate provisions concerning counsel's monitoring due to the burdens that monitoring imposes on the receivership. Instead, both cases concern whether plaintiffs' counsel should be entitled to recover *legal fees* for monitoring done pursuant to consent decrees when there were other monitoring devices in place (a Special Master in *Duran* and a community monitor in *Jackson*). Since there is no request for legal fees before the Court, *Duran* and *Jackson* are simply inapplicable.

Plaintiffs' counsel specifically object to the Receiver's OIG proposal because the Inspector General is a political appointee, funding for the office could be cut at any time, and the OIG would not have the power to require the Receiver to comply with it findings. Pl. Opp. pp.

37-39. None of these objections warrant rejecting the Receiver's proposal. The fact that the OIG is a political appointee and that the funding for the office is subject to the vagaries of the State budgeting process do not undercut the OIG's experience in monitoring prisons and valuable role that it can play here. *See* Reply Hagar Decl. ¶ 27. Ultimately, the goal is to restore the prison medical care system to the State. Getting the State involved now in monitoring the system makes sense and the monitoring can be done much more cost effectively by one independent agency rather than lawyers to the parties. Finally, although the OIG may not have the power to require the Receiver to comply with its findings, this Court does.

In light of the OIG monitoring program, the Receiver proposes a moratorium on plaintiffs' counsel's time-intensive monitoring for the next twelve months. If at the end of the twelve months, plaintiffs' counsel believes there remains a need for monitoring by counsel, the Receiver proposes that plaintiffs' counsel be permitted to bring a motion to restore some or all of their previous monitoring activity upon a showing of a need for the same. Reply Hagar Decl. ¶ 29.

F. Provisions of the Patient Care Order that should be modified.

Plaintiffs concede that four of the six provisions identified by the Receiver in the Patient Care Order should be eliminated, specifically the reclassification and salary adjustments of physicians and adding regional clinic directors, regional hiring of primary care providers, adding onsite clinics through residency program affiliations, and requirements of hiring staff to support the SATS-LITE tracking system (Patient Care Order ¶¶ 17-20, ¶ 23). Pl. Opp. 16 n.9. The only quarrel is with the Receiver's proposal to eliminate the provisions concerning the High Risk Plan and the QMAT clinicians. These provisions, too, should be eliminated.

1. Provisions Regarding High Risk Patients (Patient Care Order, ¶¶ 13-16).

The Patient Care Order sets forth a mechanism through which defendants and the Court experts would identify high risk patients and treat them in connection with the *Plata* roll outs, and set deadlines for doing so, the last of which ended on November 1, 2004. CDCR never fully complied with these provisions. FCCL, ¶ 89. The Receiver's POA addresses the needs of high-risk patients in the POA. *See* Goal B, Objective B.3.1.2. The Receiver's POA will continue to

be refined to develop appropriate standards for high-risk patients. It makes no sense to require the Receiver to comply with provisions that did not work and deadlines that have long expired when he is working to implement interconnected elements of the POA. The Receiver's approach is to remedy the system as a whole, not piecemeal. He does not want to be required to address high-risk patients independent of his overall plan. *See* Hill Decl. ¶¶ 23-24, 26, 29, 31-33. To do so will be inefficient and increase the expense of the Receivership since it will result in a duplication of effort. *Id.* ¶ 29.

2. Fund, establish, and begin to fill no less than nine additional Quality Management Assistance Team ("QMAT") positions (Patient Care Order, ¶ 24).

The Receiver requests that the provision concerning the QMAT positions be eliminated as unworkable. QMAT personnel were to visit the various prisons and measure performance by utilizing an audit instrument, which did not work. *See* Hill Decl. ¶¶ 24, 28. QMAT audits were abandoned in 2005 even before the appointment of the Receiver. *Id.* ¶ 28. The electronic tracking system consisted of unconnected, unsupported Access databases that soon varied from location to location and contained unreliable data. The individual measures were unvalidated and yielded results that often flew in the face of direct observation data bases, and the finding were not actionable. POA pp. 43-44; Hill Decl. ¶ 21. Further, QMAT related orders have never been effectively implemented. There is no underlying management team to use the QMAT findings in an effective manner. Reply Hagar Decl. ¶ 10g(ii); Hill Decl. ¶¶ 21, 24, 28. Accordingly, the Receiver determined that the QMAT program is not an adequate quality improvement process in light of these and other shortcomings. With the Court's authorization, the Receiver plans to eliminate QMAT, and institute the clinical staffing modes set forth in Goal A, Objectives A.7 and Goal C, Objective C.6 of the POA.

Plaintiffs' counsel protest the elimination of this provision, claiming that the Receiver has not explained the unworkability of the current order nor has he offered any evidentiary support for a change despite the explanation set forth in the Opening Brief at pages 21-22 and the other authorities cited therein. What more need Receiver say? The State abandoned the QMAT audits

before the Receiver's appointment, the system did not work, and it does not fit within the POA. Hill Decl. ¶¶ 21-24, 28; Reply Hagar Decl. ¶ 10g.

Plaintiffs' counsel also object since they claim QMAT is required by the Policies and Procedures, and the Receiver must separately move to eliminate those requirements. (Pl. Opp. 18:22-19:3). Of course, he has done so in this very motion, so it is difficult to fathom plaintiffs' counsel's argument.

G. Provisions of the Clinical Staffing Order that should be modified

Plaintiffs agree that four of the eight of the provisions identified by the Receiver in the Clinical Staffing Order should be eliminated, specifically the requirements regarding recruitment and retention differentials, a regional hiring program for PCPs and RNs and expedited security clearances, credentialing, licensure and hiring for certain contracting clinicians. (Staffing Order ¶¶2a-2c, 5c, 6d-63). Pl. Opp. p. 19 n.10. Plaintiffs do object to the Receiver's proposal to eliminate the provisions expedited hiring plans, supervision for newly hired physicians, and monitoring prison health services provided by CMG/MHA/Staff Care. None of their objections have merit.

1. Expedited Hiring Plans (Clinical Staffing Order, ¶¶ 3a-3b (pp. 10-11)).

The Receiver wishes to eliminate these provisions which set time frames for hiring clinical staff because they conflict with his POA and because they require time-consuming and expensive monitoring. A new, expedited hiring process is being tested on a pilot basis. It will make it possible to bring a clinician into state service within 24 hours. Through the pilot in place, the Receiver has already brought hundreds of RNs and LVNs into State service. The degree of success of this program thus far dramatically exceeds the success of the remedial effort in the years preceding the appointment of the Receiver. Reply Hagar Decl. ¶ 10h. Expedited hiring is also addressed in the POA. *See* Goal A, Objective A.8.3.3; *see also* Objective A.8.2.

Plaintiffs' counsel's objection here echoes their other comments. They do not believe the Receiver has offered a specific enough alternative and they want to ensure they can continue monitoring the Receiver's compliance. Continued monitoring by plaintiffs' counsel only adds to the expense of the Receivership estate and diverts from more productive activities. Again, the

POA has been developed by medical professionals. It has addressed these issues, there is a pilot addressing these issues, and once the pilot is tested, it will be implemented elsewhere. The proposed change should be adopted.

2. Supervision of Newly Hired Physicians (Clinical Staffing Order, ¶5a (p. 12)).

The Staffing Order requires newly hired physicians working at prisons where both the Chief Medical Officer and Chief Physician & Surgeon positions are vacant to be supervised by the Regional Medical Director. This is precisely the specific type of requirement which inhibits the flexibility by the Receiver to implement his POA. Plaintiffs object again on the basis that the POA is not specific enough, again reflecting their fundamental lack of understanding concerning clinical development of medical standards and procedures. The Court should modify the order as requested.

3. Establish an adequate program to monitor prisoner health services provided by CMG/MHA/Staff Care (Clinical Staffing Order, ¶ 6g (p. 14)).

Plaintiffs' again object to the Receiver's proposed change because his POA is too "general." This refrain by Plaintiffs should be rejected for the same reasons as stated above.

III. CONCLUSION

For all the foregoing reasons, the Receiver requests modification of the Stipulated Injunction, Patient Care Order and Clinical Staffing Orders as set forth above.

Dated: July 30, 2007

FUTTERMAN & DUPREE LLP

By /s/
Jamie L. Dupree
Attorneys for Receiver Robert Sillen

CERTIFICATE OF SERVICE

The undersigned hereby certifies as follows:

I am an employee of the law firm of Futterman & Dupree LLP, 160 Sansome Street, 17th Floor, San Francisco, CA 94104. I am over the age of 18 and not a party to the within action.

I am readily familiar with the business practice of Futterman & Dupree, LLP for the collection and processing of correspondence.

On July 30, 2007, I served a copy of the following document(s):

RECEIVER'S REPLY MEMORANDUM IN SUPPORT OF MOTION FOR ORDER MODIFYING STIPULATED INJUNCTION AND OTHER ORDERS ENTERED HEREIN

by placing true copies thereof enclosed in sealed envelopes, for collection and service pursuant to the ordinary business practice of this office in the manner and/or manners described below to each of the parties herein and addressed as follows:

___ BY HAND DELIVERY: I caused such envelope(s) to be served by hand to the address(es) designated below.

_X_ BY MAIL: I caused such envelope(s) to be deposited in the mail at my business address, addressed to the addressee(s) designated. I am readily familiar with Futterman & Dupree's practice for collection and processing of correspondence and pleadings for mailing. It is deposited with the United States Postal Service on that same day in the ordinary course of business.

___ BY OVERNIGHT COURIER SERVICE: I caused such envelope(s) to be delivered via overnight courier service to the addressee(s) designated.

___ BY FACSIMILE: I caused said document(s) to be transmitted to the telephone number(s) of the addressee(s) designated.

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